(10)

No. 97-9361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LOUIS JONES, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, California 95816
Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

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QUESTIONS PRESENTED

1. Whether the petitioner was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without possibility of release.

2. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that the deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe than life imprisonment.

3. Whether the court of appeals correctly held that the submission of invalid non-statutory aggravating factors was harmless beyond a reasonable doubt.

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to a reliable determination of guilt and to the imposition and execution of a just punishment.

The defendant in this case asks the Court to construe the Federal Death Penalty Act to allow a single juror to veto the death penalty despite the well-founded conclusion of the other

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

eleven jurors. Such an arbitrary mechanism for blocking justice would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In February 1995, defendant Louis Jones kidnapped Private Tracie McBride from Goodfellow Air Force Base near San Angelo, Texas. *United States* v. *Jones*, 132 F. 3d 232, 237 (CA5 1998). In the course of the abduction, he assaulted and severely injured another private who had attempted to rescue McBride. He subsequently confessed, after being advised of and waiving his right to remain silent. *Ibid.*

> "In his statement, Jones admitted to taking McBride back to his apartment, tying her up, and placing her in the closet. Jones stated that he then drove McBride to a remote location where he repeatedly struck her over the head with a tire iron until she was dead." *Ibid.*

He led investigators to the body. "The autopsy . . . revealed evidence of sexual assault." *Ibid.*

The jury convicted Jones of kidnapping resulting in a death, 18 U. S. C. § 1201(a)(2). *Jones*, 132 F. 3d, at 237-238. The jury further found that he intended to kill McBride. *Id.*, at 238. The jury also found unanimously and beyond a reasonable doubt two statutory aggravating factors: causing death during a kidnapping and committing the offense in an especially heinous, cruel, and depraved manner. *Ibid.*

The jury found two non-statutory aggravating factors unanimously, and ten mitigating factors were found by one or more jurors. *Ibid.* However, none of the mitigating factors was found unanimously, and only two were found true by even a majority of the jury. Brief for Petitioner 11-12, n. 7. Although defendant calls his psychiatric testimony "compelling," *id.*, at 45, only *one* juror believed it. *Id.*, at 12, n. 7. Similarly, eleven jurors rejected his claim of "severe mental or emotional disturbance," *id.*, at 11, n. 7, and two-thirds rejected the notorious "abuse excuse." See *ibid.*

After weighing the aggravating against mitigating factors, the jury unanimously recommended the death penalty. *Jones*, *supra*, 132 F. 3d, at 239.

Defendant appealed. Among other grounds, he contended that the jury should have been instructed that failure to reach a unanimous verdict would have resulted in a life sentence. *Id.*, at 242. He had requested an instruction expressly telling the jury that a single juror could veto a death sentence, prevailing over the contrary opinion of the other eleven jurors. Brief for Petitioner 9-10. The Fifth Circuit rejected this argument at its premise, holding that a hung jury would not require a life sentence, but instead that a second jury would be impaneled for a new sentencing hearing. *Jones*, 132 F. 3d, at 243.

On October 5, 1998, this Court granted certiorari limited to the questions stated *supra*, at i. This brief *amicus curiae* addresses only Question 1.

SUMMARY OF ARGUMENT

The Fifth Circuit correctly interpreted the statute. Under the Federal Death Penalty Act, if the jury hangs at the penalty phase, the trial court must declare a mistrial and impanel a second jury.

The single-juror veto system urged by defendant would make the death penalty more arbitrary and more biased. The policy considerations underlying *Furman* v. *Georgia* require that courts construe statutes to make capital sentencing as evenhanded as possible. The choice of sentence should be based on the offense and the offender, not on the idiosyncracies or prejudices of the jurors. Random, idiosyncratic, or biased life sentences for defendants who deserve death are just as detrimental to evenhanded sentencing as the reverse situation. A single-juror veto would make such verdicts more likely.

The text of the statute is contrary to defendant's interpretation, and the scant legislative history does not support it. Defendant's interpretation would make two sections of the law contradict each other, while the Court of Appeals' interpretation makes them consistent.

ARGUMENT

I. Construing the statute to authorize a single-juror veto would make the federal death penalty more arbitrary and less evenhanded.

The long, sometimes winding, path of this Court's Eighth Amendment jurisprudence has produced two central principles. See *California* v. *Brown*, 479 U. S. 538, 544 (1987) (O'Connor, J., concurring). One, which might be called the evenhandedness principle, is that the sentencer's " 'discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' " *Ibid.* (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (lead opinion)). The other, which might be called the individualization principle, is that the "sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense." *Ibid.*

These two principles are sometimes referred to as being in "tension," *ibid.*; see *Tuilaepa* v. *California*, 512 U. S. 967, 973 (1994), and sometimes in more colorful language. See *Walton* v. *Arizona*, 497 U. S. 639, 664 (1990) (Scalia, J., concurring). Even so, in *Tuilaepa* the Court noted a common principle: "The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." 512 U. S., at 973.

Minimizing bias and caprice is not the same as minimizing the number of death sentences rendered. The statutes struck down in *Furman* v. *Georgia*, 408 U. S. 238 (1972) were invalid because the persons sentenced to death under them were a "capriciously selected random handful." *Id.*, at 309-310

(opinion of Stewart, J.). The death penalty was "unusual" because it was not imposed often *enough* for death-eligible offenses. *Id.*, at 309. A system that makes an offense capital but grants mercy at random is just as capricious as one that imposes capital punishment at random.

Then there is the problem of *McCleskey* v. *Kemp*, 481 U. S. 279 (1987). McCleskey's expert claimed that his study showed that defendants who had murdered white victims were more likely to be sentenced to death than defendants who had murdered black victims. See *id.*, at 320 (Brennan, J., dissenting). Fortunately, the problem is nowhere near as stark as the dissent made it out to be. See *McCleskey* v. *Kemp*, 580 F. Supp. 338, 379 (ND Ga. 1984) (study's race-of-victim bias finding based on flawed, incomplete models); Death Sentencing Issues: Hearings before the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives, 102d Cong., 1st Sess., ser. 33, p. 92 (1990) (statement of Stephen P. Klein, Ph.D.) ("controlling for several case characteristics shrunk [the] disparity to 3 percentage points—a difference that was not statistically significant"). Even so, any possibility of bias along these lines is a matter for public concern.

Justice Brennan was undeniably correct when he said that "diminished willingness to render [a death] sentence when blacks are victims[ ] reflects a devaluation of the lives of black persons." *McCleskey*, *supra*, 481 U. S., at 336 (dissent); see also Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev 95, 125 (1987). The problem, though, was that the injustice had not been committed in McCleskey's case. He was guilty and deserved his punishment. The injustice was committed in the black-victim cases where a death sentence should have been returned but was not. Those injustices, unfortunately, cannot be corrected on appeal. See *Bullington* v. *Missouri*, 451 U. S. 430, 446 (1981) (double jeopardy protection extended to capital sentencing decision).

Constitutional doctrine cannot cure every problem. In particular, its ability to minimize caprice and bias is limited, especially when the problem consists of random or biased grants of lenient sentences to undeserving defendants. A doctrine that the state cannot do justice in *any* case until it does justice in *every* case, thereby overturning the well-deserved sentences of guilty criminals, would be a disaster. That, in essence, was the proposal which this Court rejected in *McCleskey* and which Congress rejected when it deleted the so-called Racial Justice Act. See H. R. Rep. No. 103-711, Conference Report to accompany H. R. 3355, 103d Cong., 2d Sess., 388 (1994).

We must look elsewhere for answers. Legislatures should write sentencing procedure statutes that minimize the chances of arbitrary, capricious, or biased decisions *in either direction*. When statutes are subject to more than one interpretation, courts should construe them in a way to promote the goal of evenhandedness, at least when that can be done without damage to the goal of individualization.

Almost all of this Court's prior post-*Furman* capital cases have involved state statutes, so the task of construing the statutes has rested primarily with state courts. See, *e.g.*, *Zant* v. *Stephens*, 456 U. S. 410, 416-417 (1982) (*per curiam*) (certifying to state court a question on operation of state's capital sentencing system). Now, however, this Court must construe a federal statute. Construing an arguably ambiguous federal statute is a different task from deciding whether a state statute, as authoritatively construed by the state's high court, has crossed the constitutional line. The latter task involves delicate questions of federalism and judicial restraint.[2] Statutory construction, however, does not cross the state-federal line,

2. The surfeit of constitutional rules in this area has already stifled innovation. Anyone who proposes an improvement to a state's capital sentencing procedure is confronted with the objection that the existing statute has been upheld, and any change will produce a new constitutional challenge.

and the result can be changed by Congress if it proves to be unwise. Policy considerations therefore play a larger role here.

"In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States* v. *Heirs of Boisdoré*, 8 How. (49 U. S.) 113, 122 (1850).[3] The object and policy of the statute tracks this Court's Eighth Amendment jurisprudence. Its purpose is not to give the defendant every possible opportunity to escape the death penalty, but rather to build a structured system of guided discretion, to make the implementation of capital punishment as evenhanded as possible within the constraints of the individualization requirement.

Congress's preference for evenhandedness over maximum leniency is evident at several points. In 18 U. S. C. § 3593(a), Congress authorized victim impact evidence to correct the imbalance which results from individualizing the defendant but not the victim. See *Payne* v. *Tennessee*, 501 U. S. 808, 825-826 (1991). Subsection (c) of that section imposes the burden of proof of mitigating factors on the defendant, thus reducing the chance that a factor would be found merely by the failure of the prosecution to rebut it. Subsection (e) directs the jury to the relatively structured question of whether mitigating factors outweigh aggravating, rather than the open-ended question of what sentence is appropriate. Significantly, language from earlier bills that the sentencer is never required to impose the death sentence was not included. Cf. H. R. Rep. No. 103-467, 103d Cong., 2d Sess., 21-22 (1994) (dissenting view of Mr. Hyde et al.) (arguing that the "never required" language leads to "unbridled and arbitrary discretion").

Finally, Congress made the jury's recommendation of a death sentence binding on the trial court, rather than giving the

3. This Court has quoted this maxim many times over the years. See, *e.g.*, *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 51 (1987); *Dunn* v. *Commodity Futures Trading Comm'n*, 519 U. S. 465, 478 (1997).

judge a broad override power. See 18 U. S. C. § 3594. An override would make the imposition of a death sentence depend, in a large degree, upon the defendant's "luck of the draw" in assignment of judges. This effect would be particularly pronounced in the federal system, with life tenure and no peremptory challenge of judges.

For the reasons stated in part II, *infra*, *amicus* believes this statute, on its face, requires a unanimous jury, and it provides for discharge of the jury and impaneling a new one in the event of deadlock. If, however, the Court should find any ambiguity in this regard, *amicus* submits that the Court should choose the interpretation which promotes evenhandedness in sentencing. That is the interpretation which minimizes the likelihood of a capricious or biased result *in either direction.*

In reviewing individual cases, appellate courts generally presume that jurors follow their instructions. That presumption "is a pragmatic one," and it is not rooted in an "absolute certitude" that it is true. See *Richardson* v. *Marsh*, 481 U. S. 200, 211 (1987). The presumption has its limits, and sometimes courts must recognize that jurors may not follow their instructions. See *ibid.* (*Bruton* rule).

In capital sentencing, jurors are instructed to base their verdicts solely on the authorized aggravating and mitigating factors. Factors which do not belong in the mix include "mere sympathy," *i.e.*, "emotional responses that are not rooted in the aggravating and mitigating evidence," *Brown, supra*, 479 U. S., at 542, beliefs or associations of the defendant, however vile they may be, if they are not relevant to an aggravating circumstance, *Dawson* v. *Delaware*, 503 U. S. 159, 167 (1992), and, of course, the race of the defendant or of the victim. Jurors should also not vote a particular way because they are so adamantly opposed to or in favor of capital punishment that they cannot or will not follow the law as set forth in the instructions. *Wainwright* v. *Witt*, 469 U. S. 412, 424 (1985) allows the removal of the hard core opponents, and *Morgan* v. *Illinois*, 504 U. S. 719, 729 (1992) requires removal of the hard

core supporters. Yet we all know that some such jurors do slip through, either because they lie in *voir dire* or because they do not fully realize the depth of their own feelings until the moment of truth. See *Witt*, 469 U. S., at 425-426.

A verdict which results from the idiosyncracies of jurors, rather than from the actual balance of aggravating and mitigating factors, is neither evenhanded nor individualized. Such verdicts do not apply the law equally to similarly situated defendants, and they are not based on the circumstances of the crime or the defendant's character or record. Cf. *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion).

The danger of such a verdict would be greatly magnified by allowing a single juror to veto the considered decision of the other eleven. The *Witt*-excludable jurors who occasionally slip through *voir dire* would produce random life sentences for a few defendants who deserve death, based not on the defendant's culpability but only on his luck in getting such a juror. That would be a macabre lottery. No advanced statistics are needed to understand that if it is unusual for one such juror to be seated on a panel of twelve, the odds against such jurors making up all or most of a panel are astronomical. Thus, a requirement that the jury be unanimous, with a mistrial and new jury if it deadlocks, guards against this kind of randomness.

The arbitrariness of a single-juror veto was an important factor in the decisions in *Mills* v. *Maryland*, 486 U. S. 367 (1988) and *McKoy* v. *North Carolina*, 494 U. S. 433 (1990). The jury instructions in *Mills* arguably required the jury to disregard a mitigating circumstance if it could not agree unanimously on the existence of that circumstance. 486 U. S., at 371. A "no" finding on all mitigating circumstances required a verdict of death. See *id.*, at 389. Thus, the defendant raised the hypothetical possibility that eleven jurors could believe that six mitigating circumstances had been proven and that the death penalty was wholly inappropriate, yet the single holdout juror could force a death sentence. *Id.*, at 373-374. Such a veto power, the Court said, would be "the height of arbitrariness."

Id., at 374. "[I]t's difficult to imagin[e] a more arbitrary system than the luck of the draw: Do I get one juror?" *McKoy*, 494 U. S., at 453 (Kennedy, J., concurring in the judgment) (quoting oral argument in *Mills*).

It is not difficult at all, though, to imagine an *equally* arbitrary system. A system that allows a single juror out of twelve to block a death sentence is just as arbitrary as one that allows a single juror to impose it. A reverse-*Mills* arbitrariness could arise if a single juror found a mitigating circumstance true, and insisted it outweighed the aggravating circumstances, even though the other eleven were absolutely convinced it was false.[4] The choice between life or death should not depend upon the presence of one particularly gullible juror who is willing to accept "expert" testimony that the vast majority of people would reject as nonsense.

The Constitution may tolerate more arbitrariness on one side than it does on the other, but that does not make it good policy. Arbitrariness is an undesirable feature of a capital sentencing system, and it should not be read into a statute unless the language unmistakably requires it. Every presumption should be in favor of evenhandedness and against arbitrariness.

Even worse than arbitrariness is bias. A single juror with veto power might exercise that power based on a racist belief that killing a black person is not as great an offense as killing a white person. See *supra*, at 5. The requirement of unanimity reduces the chance of such a verdict. This effect was recognized in Congressional hearings on an earlier bill with similar language:

> "Mr. DENNIS [Assistant Attorney General]. 'Well, first of all, as a general proposition—and again, based on my own experiences—I think juries try to be conscientious. First of all, not everyone is responsible, but we have many procedures with regard to ensuring the fairness of the jury, and not all of them are even related to the death penalty.
>
> [Description of *voir dire*, challenges, and 18 U. S. C. § 3593(f) omitted.]
>
> " 'I think that is the way, and I think the bill is absolutely on target with how you deal with the potential that a verdict might be based upon bias. *Remember, it has to be unanimous. You know, one person might be biased, but the chances that one person is going to be able to persuade 11 others to his or her position based on bias— —*'
>
> "Mr. MCCOLLUM. 'That's what has always bothered— —'
>
> "Mr. DENNIS. 'I think, as a practical matter of understanding the procedures, you have to realize that these procedures should be adequate to the task.'
>
> "Mr. MCCOLLUM. 'You know, that's what has always bothered me about the statistics on this point, even though I don't doubt that there has been racial bias in sentencing in parts of the country from time to time. But overall, *with the unanimous jury requirement*, it seems to me, in this day and age, that I believe we have improved dramatically in regard to racial bias in this country. I just have a hard time believing there would be very many cases in this country ever in the future where you get *a full jury* that would be racially biased.' " Federal Death Penalty Legislation: Hearings before the Subcommittee on Crime, Committee on the Judiciary, House of Representatives, 101st Cong., 2d Sess., ser. 95, pp. 358-359 (1990) (emphasis added).

If the unanimity requirement is going to protect minority victims as well as minority defendants, then it must preclude nonunanimous life sentences as well as nonunanimous death sentences.

> "Jury unanimity, it is true, is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the

4. In the present case, for example, the psychiatric testimony was rejected by eleven jurors. See *supra*, at 2.

conscience of the community." *McKoy, supra*, 494 U.S., at 452 (Kennedy, J., concurring in the judgment).

A statute which provides that, when a jury deadlocks 11-1 for death, the decision of the one prevails over the decision of the eleven would throw away these important values. Congress has the power to enact such a statute, but courts should not lightly assume it has done so. The presumption should work the other way.

II. 18 U. S. C. § 3593 allows the trial court to impanel a new jury if a jury deadlocks over the sentence.

A. Statutory Text.

The claim that the inability of the jury to agree on a unanimous verdict eliminates the possibility of a death sentence is inconsistent with the text of the relevant statutes. The relevant language is found in two portions of 18 U. S. C. § 3593 and in 18 U. S. C. § 3594. When read together in their proper context, these three provisions provide unambiguous textual support for the Court of Appeals' decision. See *Conroy* v. *Aniskoff*, 507 U. S. 511, 515 (1993) (statute must be read as a whole as the meaning of the language depends upon its context).

The first pertinent provision is 18 U. S. C. § 3593(e), which sets forth the process by which the jury comes to its sentencing recommendation. Subdivision (e) begins by describing the sentencer's duty to weigh the aggravating and any mitigating factors and thus determine whether death is appropriate. This provision concludes with the first relevant passage:

> "Based upon this consideration [of aggravating and mitigating factors], the jury *by unanimous vote*, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without the possibility of release or some other lesser sentence." (Emphasis added.)

This establishes a unanimity requirement for any jury-imposed sentence. "Unanimous vote" comes before "shall recommend," thus requiring all recommendations made under this section to be unanimous. Since the jury can recommend any possible sentence under this provision ("death, to life imprisonment without possibility of release, or some lesser sentence"), any sentence recommendation by a jury must be unanimous.

Section 3593(e) does not, however, explain what shall be done if the jury cannot reach a unanimous recommendation. Defendant looks to another statute, 18 U. S. C. § 3594, for that answer:

> "Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release."

Defendant focuses upon the term "otherwise." He asserts that since a hung jury is a result other than a recommendation of death or life without parole, it must be one of the results encompassed by the "otherwise" clause. See Brief for Petitioner 34. A hung jury would require a life-without-release sentence if that was the minimum and some lesser sentence if a lesser sentence is authorized. See Brief for Petitioner 35, and n. 27.

The first problem with this reading of the statute is its potentially absurd result. If a jury was deadlocked at eleven votes for death and one vote for life without parole, the court would seemingly be required to sentence defendant to some sentence "lesser" than these two options in any case where a lesser sentence is authorized. Under defendant's expansive reading of this clause, the court would thus be forced ("the court

shall impose," *ibid.* (emphasis added)) to impose a sentence less severe than the least any juror thought appropriate. As this Court long ago recognized:

> "frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration . . . of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 459 (1892); see also *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 454 (1989).

Congress could not have intended the absurd result which defendant's reading mandates.

The last sentence of section 3594 does provide a possible way to alleviate this absurdity:

> "Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release."

This sentence provides a way for a court to impose a life without possibility of parole sentence if the "lesser sentence" could be life. This reduces but does not eliminate the possibility of the above-mentioned absurd result. Since the last sentence of section 3594 is permissive, not mandatory, the trial court would still be authorized to impose "any lesser sentence" even if no juror agreed with that sentence.

Defendant's interpretation of section 3594 has additional textual problems. Section 3593(b) allocates whether the sentencing hearing is before a judge or jury. The relevant portion states that:

> "The hearing shall be conducted —
>
> "(1) before the jury that determined the defendant's guilt;
>
> "(2) before a jury impaneled for the purpose of the hearing if —

> ". . . (C) the jury that determined the defendant's guilt was discharged for good cause . . . ."

An inability to reach a unanimous verdict is good cause to discharge the jury and impanel a new one. Generally, it is within the discretion of the trial court to declare a mistrial if the jury cannot agree on a verdict. See, *e.g.*, 26 J. Moore, et al., Moore's Federal Practice § 631.11[1], pp. 631-33 (3d ed. 1998); *United States* v. *Kramer*, 955 F. 2d 479, 490 (CA7 1992). A hung jury constitutes a "manifest necessity" to terminate the trial and retry defendant without violating the Double Jeopardy Clause. See *Richardson* v. *United States*, 468 U. S. 317, 323-324 (1984). A hung jury easily satisfies any reasonable definition of "good cause," particularly in light of the strong policy reasons for encouraging unanimous verdicts in capital sentencing. See part I, *ante*, at 4-12.

As the federal capital sentencing procedure established in section 3593(b) contemplates retrying the penalty phase if the first sentencing jury cannot reach a unanimous verdict, the deadlocked jury does not come within section 3594's "otherwise" clause. Text cannot be read in isolation; "a statute is to be read as a whole . . . ." *King* v. *St. Vincent's Hosp.*, 502 U. S. 215, 221 (1991). " 'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate, take their purport from the setting in which they are used . . . .' " *Ibid.* (quoting *NLRB* v. *Federbush Co.*, 121 F. 2d 954, 957 (CA2 1941) (L. Hand, J.)). Defendant's "otherwise" cannot be read alone. That term and the following sentence must be read in the context of the entire statutory scheme.

Section 3594's "otherwise" clause is best read as applying only to those unanimous recommendations of sentences other than death or life without parole. This interpretation avoids the possible absurd result from applying the "otherwise" clause in a jury deadlocked between death and life without parole. See *ante*, at 13. This reading is also harmonious with the language following "otherwise"—"the court shall impose any lesser

sentence that is authorized by law." 18 U. S. C. § 3594. Since the jury has already recommended some "lesser sentence," there will be much less tension between the jury's recommendation and the court's sentence than under defendant's reading of this statute.

The doctrine of lenity does not change the analysis. This doctrine is not an ironclad rule. Instead, it operates more like a gentle nudge, pushing a closely balanced interpretation of an unquestionably ambiguous statute towards defendant. It

> "is not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of the act,' *Huddleston* v. *United States*, 415 U. S. 814, 831 (1974), such that even after a court has ' "seize[d] every thing from which aid can be derived," ' it is still 'left with an ambiguous statute.' " *Chapman* v. *United States*, 500 U. S. 453, 463 (1991) (quoting *United States* v. *Bass*, 404 U. S. 336, 347 (1971) (quoting *United States* v. *Fisher*, 2 Cranch 358, 386 (1805))).

The present case does not involve such unsolvable ambiguity.

In addition, the purpose of the rule of lenity is to ensure that the law gives people fair warning as to what the law prohibits and what the penalties are for violations. *United States* v. *Lanier*, 520 U. S. 259, 266 (1997). It is closely related to the *Ex Post Facto* Clause and the due process rule of *Bouie* v. *City of Columbia*, 378 U. S. 347, 353-354 (1964). See *Lanier*, 520 U. S., at 266-267. These related "fair warning" rules simply do not apply to matters of procedure; they are limited to substantive law. Legislatures and courts can and do change procedure "retroactively" to the detriment of criminal defendants. See *Miller* v. *Florida*, 482 U. S. 423, 433 (1987) ("no *ex post facto* violation occurs if the change in the law is merely procedural"); *Teague* v. *Lane*, 489 U. S. 288, 311 (1989) (plurality opinion) (applying new rule on "new rules" to pending case). In civil matters as well, the rule of statutory construction that raises a presumption against retroactivity does not apply to "[c]hanges in procedural rules" which "regulate secondary rather than

primary conduct . . . ." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 275 (1994). The reason, again, is the "diminished reliance interests in matters of procedure." *Ibid.*

The rule of lenity shares its basic purpose with these kindred doctrines, and it should share the same limitation. It has little or no application to rules of procedure; it applies to the rules that define crimes and establish punishments. Statutes of procedure should be construed evenhandedly, without favortism to either side.

In summary, section 3593(e) gives the jury three options on the sentence and requires it to reach a unanimous verdict on the choice. Section 3594 addresses only the final product of the jury process, instructing the trial court what to do with each of the three permitted outcomes. It does not address the consequences of the jury's inability to reach unanimity. That issue is addressed by section 3593(b)(2)(C), which provides for a second jury.

B. Legislative History.

In part II A of his brief, defendant argues that the legislative history of the statute supports his interpretation. Yet he does not cite any history of the bill that actually passed. Instead, he cites a report on another bill. See H. R. Rep. No. 103-467, 103d Cong., 2d Sess., 9 (1994) (report accompanying H. R. 4035). A weaker argument on legislative history is difficult to imagine.

The language in question did not originate with H. R. 4035, which was the subject of this report. Substantially the same language goes back at least as far as Senate Bill 32 in 1989. See, *e.g.*, S. Rep. No. 101-170, 101st Cong., 1st Sess., 10-12 (1989). H. R. 4035 and its committee report reached the House floor, 140 Cong. Rec. H2217 (daily ed. April 12, 1994), and went no further. That is the last mention of it in the Congressional Record.

> "The purpose of a committee report is to provide the Members of Congress who have not taken part in the committee's deliberations with a summary of the provisions

of the bill and the reasons for the committee's recommendation that the bill should become law." *Chicago* v. *Environmental Defense Fund*, 511 U. S. 328, 345, n. 7 (1994) (Stevens, J., dissenting).

The premise that legislators are aware of and rely on the committee report has been questioned even when the report relates to the same bill. See *United States* v. *R. L. C.*, 503 U. S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment). Perhaps this premise, like that of jurors following their instructions, see *ante*, at 8, is accepted more as a practical matter than on the belief it is true. The premise loses *any* connection with reality, though, when the report in question relates to a bill which was neither the origin of the language nor the bill actually voted on. All we have here is an isolated statement buried in a committee report on a bill that went nowhere, interpreting language that had been bouncing around Congress for half a decade.[5]

United States v. *Gonzales*, 520 U. S. 1 (1997) is instructive on the limitations of legislative history. In that case, the question was whether a federal firearms sentence could run concurrently with a state sentence, despite the plain language of the statute forbidding concurrent running. *Id.*, at 2-3. In the present case, the question is whether the jury can produce a binding result without being unanimous, despite the unequivocal statutory command that it decide on the sentence "by unanimous vote." See 18 U. S. C. § 3593(e).

In *Gonzales*, as in the present case, the defendant relied on a "snippet of legislative history." 520 U. S., at 6. (Unlike the present case, Gonzales was at least relying on the history of the bill that actually passed. *Ibid.*) The Court was unimpressed. The two statutes in question "clash only if we engraft onto

5. In part I of this brief, we cite reports and hearings on some earlier bills. Lest we be accused of inconsistency, we note at this point that we cite these materials only for general policy issues. We make no claim that they are definitive legislative history of H. R. 3355.

§ 924(c) a requirement found only in a single sentence buried in the legislative history . . . . We therefore follow the text, rather than the legislative history, of § 924(c)." *Id.*, at 7-8.

Similarly, defendant Jones asks the Court to use a single sentence of legislative history to make section 3594 contradict the clear command of section 3593(e), that only a unanimous jury can decide the sentence. The Court's response should be the same. The statutes can and should be construed in a manner which makes them consistent with each other. The isolated snippet of history, an interpretation by a committee staffer buried in a report on a different bill never voted on by the House, should be brushed aside as inconsequential.

CONCLUSION

The decision of the Court of Appeals, to the extent it rejected defendant's proffered instruction on the consequences of jury deadlock, should be affirmed.

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Respectfully submitted,

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation